No. 17-340

IN THE

Supreme Court of the United States

NEW PRIME INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Must a court compel arbitration of the question whether it has authority under the Federal Arbitration Act to compel arbitration, simply because the arbitration provision contains a delegation clause?

2. Should the Federal Arbitration Act's exemption for transportation workers' "contracts of employment," 9 U.S.C. § 1, be interpreted in accordance with the universal meaning of the term "contract of employment" at the time the statute was enacted, as the First Circuit held, or should it be construed more narrowly than its plain text allows?

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INTRODUCTION

The decision below is unremarkable: It holds that before relying on the Federal Arbitration Act to compel arbitration, a court must determine whether the Act applies. And it holds that the words of the Federal Arbitration Act must be interpreted according to their common meaning at the time the statute was passed. Prime's contention that these unexceptional conclusions warrant review is meritless.

First, Prime argues that this Court's precedent conflicts with the First Circuit's holding that a court must determine whether the Federal Arbitration Act applies before relying on the Act to compel arbitration. Not so. Contrary to Prime's contention, this Court has never held that the Federal Arbitration Act requires courts to compel arbitration of the question whether they have authority under the Act to compel arbitration. Nothing in this Court's case law even suggests that absurd proposition.

Nor is there a circuit split worthy of review on this issue. The only other Circuit to have analyzed the issue in anything more than a cursory fashion came to the same conclusion as the First Circuit.

Second, Prime takes issue with the First Circuit's holding that the Federal Arbitration Act's exemption for transportation workers' "contracts of employment" applies to all transportation workers' agreements to perform work. But the First Circuit merely applied the exemption in accordance with the common meaning of its terms at the time the Federal Arbitration Act was passed. This Court has repeatedly held that the words of a statute must be given their ordinary meaning at the time the statute was enacted. The lower court simply followed this Court's instruction.

And contrary to Prime's contention, the First Circuit's interpretation does not conflict with that of any other Circuit. It couldn't—the First Circuit is the first federal Court of Appeals to consider this issue.

Finally, Prime's dramatic claim that the decision below will somehow make it impossible to arbitrate throughout the entire transportation industry is demonstrably false. As the First Circuit explained in its opinion, its holding is extremely limited: It applies only to the contracts of employment of transportation workers and only to the Federal Arbitration Act. It has no impact on non-employment contracts within the transportation industry and no impact on state laws governing arbitration. The decision doesn't render arbitration agreements in the transportation industry unenforceable. It merely means that a small subset of those agreements must be enforced under state, rather than federal, law.

In fact, while Prime argues to this Court that the decision below will have a sweeping impact that must be reviewed, it is simultaneously arguing to the district court on remand that the First Circuit's decision has *no* impact because, Prime contends, even if the company cannot compel arbitration under federal law, it can do so under Missouri law.

Prime seeks review of a decision that is fully in accordance with this Court's precedent, does not conflict with any other Circuit that has taken more than a cursory look at the issues, and by its own terms, has limited impact. Prime's petition should be denied.

STATEMENT OF THE CASE

1. New Prime, Inc. is a national trucking company that recruits drivers by advertising a "Paid Apprenticeship," in which new drivers haul goods for Prime

alongside an experienced Prime driver for 10,000 miles. Prime App. 183-84. Prime guarantees that drivers who work for the company as "apprentices" will earn a minimum of $600 per week. Prime App. 36.[1]

In March 2013, Dominic Oliveira began working for Prime as an "apprentice." Prime App. 183-84. But Prime did not pay him the income the company promised. In fact, Prime did not pay him anything at all. Prime App. 184. It turns out Prime actually *charges* drivers to apprentice at the company. Prime App. 13, 41.

After driving 10,000 miles for Prime, Prime upgraded Mr. Oliveira's status from "apprentice" to "driver trainee," and began paying Mr. Oliveira for his work. Prime App. 184. But they paid him well below minimum wage. During his time as a "trainee," Mr. Oliveira drove thousands of miles per week for the company, for which he earned approximately $440-$480 weekly—or about $4 per hour. *Id.*

After driving 30,000 miles for Prime as a "driver trainee," Mr. Oliveira became a regular Prime driver. Prime App. 184. As a condition of his continued employment, the company required Mr. Oliveira to sign an Operating Agreement. Prime App. 185. Although Mr. Oliveira did exactly the same work as drivers the company labeled employees, the Operating Agreement labeled Mr. Oliveira an "independent contractor." Prime App. 18, 185-86.[2]

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[1] This brief refers to the appendix Prime filed before the Court of Appeals as Prime App.

[2] Mr. Oliveira was actually required to sign two Operating Agreements, one when he first became a regular driver for Prime, and an identical one the following year to continue his employ-

Again, Prime did not consistently pay Mr. Oliveira minimum wage. Prime made regular deductions from Mr. Oliveira's paycheck—for "lease payments" on the truck he drove, for the tools Prime required him to buy, and for the fuel required to haul freight. Prime App. 186-87. Because of these deductions, on several occasions, Mr. Oliveira's paycheck was actually negative, despite having spent dozens of hours on the road driving for Prime. Prime App. 187. That is, Prime sometimes *charged Mr. Oliveira* for working for the company.

2. On March 4, 2015, Mr. Oliveira filed a lawsuit, alleging that Prime violated state and federal law by failing to pay him—and other similarly situated Prime drivers—minimum wage. Prime App. 2, 26-29. Prime moved to compel arbitration, based on an arbitration clause contained in the Operating Agreement it required Mr. Oliveira to sign. Prime App. 73. The company relied solely on the Federal Arbitration Act, expressly disclaiming any reliance on state law or any other source of authority. *See* Prime App. 157.

The district court denied the motion to compel. Prime App. 201. And the First Circuit affirmed. Pet. App. 2a-3a.

First, the Court of Appeals rejected Prime's argument that an arbitrator—and not the court—should decide whether the Federal Arbitration Act applies to Prime's Operating Agreement. Pet. App. 16a. Prime moved to compel arbitration under the Federal Arbitration Act. If the statute did not apply, the First Circuit explained, the court could not rely on it for authority to compel arbitration. Pet. App. 15a.

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ment. Pet. App. 5a. Because these agreements are identical, this brief refers to them together as the "Operating Agreement."

Therefore, the court concluded that whether the statute applies was a question the court itself must answer before it could decide whether to compel arbitration. Pet. App. 16a.

Second, the First Circuit held that Prime's Operating Agreement is a transportation worker's "contract of employment," exempt from the Federal Arbitration Act. Pet. App. 35a; *see also* 9 U.S.C. § 1 (providing that "nothing herein contained," i.e. nothing in the Federal Arbitration Act, "shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"). As the court noted, there is no dispute that Mr. Oliveira—a long-haul truck driver—is a transportation worker. Pet. App. 8a n.9. The only dispute on this issue, therefore, was whether the Operating Agreement—a contract for Mr. Oliveira to work for Prime—constituted a "contract of employment" within the meaning of the Federal Arbitration Act.

Following this Court's instruction that courts should give statutory terms their ordinary meaning at the time the statute was enacted, the First Circuit determined which contracts are "contracts of employment" for purposes of the Federal Arbitration Act by examining the ordinary meaning of the term "contract of employment" at the time the statute was passed. Pet. App. 25a-28a. The court found that, universally, the term meant an agreement to perform work—regardless of the employment status of the worker. *Id.* Independent contractors' agreements to perform work, just like the agreements of other workers, were uniformly called "contracts of employment." *See id.* In accordance with this ordinary meaning, the First Circuit held that by exempting the "contracts of

employment" of transportation workers, the Federal Arbitration Agreement exempted all transportation workers' agreements to perform work, including those of independent contractors. Pet. App. 30a.

The First Circuit explained that Congress's decision not to distinguish between independent contractors and other workers in the Federal Arbitration Act made sense given that—as this Court has itself explained—Congress exempted transportation workers from the Act because of its "'demonstrated concern with transportation workers and their necessary role in the free flow of goods.'" Pet. App. 29a (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001)). Transportation workers have the same "role in the free flow of goods," regardless of their "precise employment status." Pet. App. 29a-30a. Therefore, the court concluded, it was logical that the Federal Arbitration Act would not distinguish between independent contractors and other transportation workers. *See* Pet. App. 29a-30a.

Based on the plain meaning of the statute's transportation worker exemption—and its purpose—the First Circuit held that "a transportation-worker agreement that establishes or purports to establish an independent-contractor relationship is a contract of employment under" the Federal Arbitration Act. Pet. App. 34a. The court "emphasize[d]" the "limited" nature of this holding: "It applies only when arbitration is sought under the [Federal Arbitration Act], and it has no impact on other avenues (such as state law) by which a party may compel arbitration." Pet. App. 34a.

Although Judge Barbadoro wrote separately, he agreed that a court must decide whether the Federal Arbitration Act applies before relying on the statute to compel arbitration. Pet. App. 35a. He also stated that

he did not dissent "to take issue with the court's reasoning" in interpreting the transportation worker exemption, which he called "impressive." Pet. App. 40a. Rather, Judge Barbadoro wrote separately only because he believed that the First Circuit should have waited to determine whether the transportation worker exemption applies to independent contractors until after the district court had determined whether Mr. Oliveira was, in fact, an independent contractor. Pet. App. 35a-36a.

Prime petitioned for rehearing and rehearing en banc. Pet. App. 42a. The First Circuit denied the petition. *Id.*

REASONS FOR DENYING THE WRIT

I. REVIEW OF THE FIRST CIRCUIT'S CONCLUSION THAT THE TRANSPORTATION WORKER EXEMPTION SHOULD BE INTERPRETED IN ACCORDANCE WITH ITS PLAIN MEANING IS UNWARRANTED.

Contrary to Prime's contention, the First Circuit's conclusion that the term "contract of employment" for purposes of the Federal Arbitration Act encompasses all agreements to perform work—including those of independent contractors—does not conflict with either this Court's precedent or the precedent of any other Circuit. To the contrary, the First Circuit's interpretation is not only consistent with this Court's precedent, it is *required* by it—for it is the only interpretation of the Act that accords with the ordinary meaning of the term "contract of employment" at the time the statute was passed. Moreover, this interpretation cannot possibly conflict with the decision of any other

Circuit, as Prime claims, because the First Circuit is the first federal Court of Appeals to address the issue.

A. The First Circuit's Interpretation of the Transportation Worker Exemption is Consistent with this Court's Precedent.

This Court's case law establishes that the "controlling principle" of statutory interpretation "is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017).[3] Statutory interpretation, therefore, must "begin and end" by "giving each word its ordinary" meaning at the time the statute was passed. *Id.*; *see Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2165 n.2 (2015).

The First Circuit dutifully followed this Court's instruction. The Federal Arbitration Act provides that "nothing herein contained shall apply to" transportation workers' "contracts of employment." 9 U.S.C. § 1; *see Circuit City*, 532 U.S. at 109. The statute does not define the term "contract of employment." So, to determine which agreements are "contracts of employment" for purposes of the Act, the lower court carefully examined the common meaning of the term in 1925, when the statute was enacted. Pet. App. 25a-29a.

After a rigorous examination of contemporary sources, the court found that at the time the Act was passed, the common—and, in fact, *the only*—meaning of the term "contract of employment" was an agreement to perform work, regardless of the status of the worker. *See* Pet. App. 25a-29a. The historical record is

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[3] Unless otherwise specified, all internal quotation marks, citations, and alterations omitted.

absolutely clear that the term was used to describe the agreements of all workers, including independent contractors. *See id.* Countless sources, contemporary with the passage of the Act, describe an independent contractor's agreement to perform work as a "contract of employment." *See id.* And neither Mr. Oliveira nor the First Circuit found—nor has Prime identified—a single contemporary source that used the term to exclude independent contractors.

Moreover, contrary to Prime's contention, it makes perfect sense that Congress would incorporate into the Federal Arbitration Act the common meaning of the term "contract of employment" as simply an agreement to perform work. As this Court explained, the Federal Arbitration Act exempts transportation workers because of Congress's "demonstrated concern with transportation workers and their necessary role in the free flow of goods." *Circuit City*, 532 U.S. at 121. Because of transportation workers' importance to the economy, Congress wanted to ensure that it retained the power to regulate dispute resolution between transportation companies and their workers. It could not do so if transportation companies were empowered under the Federal Arbitration Act to design their own dispute resolution.

Given this purpose, it would make no sense for Congress to distinguish between independent contractors and other workers. As the First Circuit explained, transportation workers' role in the free flow of goods is no different if they are labeled "employees" than if they are labeled "independent contractors." Pet. App. 29a-30a. A strike by the nation's truck drivers, for example, would be equally damaging to interstate

commerce, regardless of whether the drivers were independent contractors or not.[4]

Nevertheless, Prime asserts that an independent contractor's agreement to perform work cannot possibly be a "contract of employment" within the meaning of the Federal Arbitration Act. Why? Essentially, because Prime says so. Prime does not dispute—or even address—the mountain of evidence demonstrating that, when the Federal Arbitration Act was passed, the term "contract of employment" was uniformly used to refer to independent contractors' agreements to perform work, as well as those of other workers. The company does not cite a *single* example, contemporary with the passage of the Act, of *any* use

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[4] Furthermore, and also contrary to Prime's assertion, there *were* other dispute resolution statutes at the time the Federal Arbitration Act was passed that *did* apply to independent contractors. *See, e.g.*, Shipping Commissioners Act of 1872, § 25, 17 Stat. 262 (authorizing government-appointed shipping commissioners to resolve disputes between a "master, consignee, agent, or owner" of a ship "and *any* of his crew" (emphasis added)); *Railway Employees' Dep't, A.F.L. v. Indiana Harbor Belt Railroad Co.*, Decision No. 982, 3 Dec. U.S. R.R. Lab. Bd. 332, 337 (1922) (explaining that in passing the Transportation Act of 1920, which governed the dispute resolution of railroad workers, Congress "undoubtedly" meant for it to apply to all "those engaged in the customary work directly contributory to the operation of the railroads"—including independent contractors); *see also* Erdman Act, 30 Stat. 424 (1898) (earlier dispute resolution statute that explicitly stated that it applied to railroad workers even if "the cars" in which they worked were "held and operated by the carrier under lease or other contract"—that is, even if they were independent contractors); Newlands Act, 38 Stat. 103 (same). If the Federal Arbitration Act applied to independent contractors, it would have conflicted with these statutes.

of the term "contract of employment" to exclude independent contractors.[5]

The only sources Prime cites for its assertion that the term "contract of employment" excludes the employment contracts of independent contractors are a Supreme Court case from *1992*—which does not address the term "contract of employment" at all—and

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[5] The first instance of the more narrow usage Prime advocates appears to be a 1954 New Mexico case—nearly thirty years after the passage of the Federal Arbitration Act. *See Nelson v. Eidal Trailer Co.*, 58 N.M. 314, 316 (1954). And even today, this narrower usage is still in the minority. The term "contract of employment" continues to be commonly used to encompass all agreements to perform work, including those of independent contractors. *See, e.g.*, Va. Code Ann. § 59.1–501.3(d)(5) (2017) ("This chapter does not apply to a contract of employment of an individual, other than an individual hired as an independent contractor . . . ."); Md. Code Ann., Com. Law § 22-103 (similar); *Gray v. FedEx Ground Package Sys., Inc.*, 799 F.3d 995, 1000 (8th Cir. 2015) (explaining that label used in "employment contract" is one of eight factors used to determine whether a worker is an independent contractor); *Fernandez v. Transp. Designs, Inc.*, No. SA-16-CA-022-OLG, 2017 WL 1294556, at *2 (W.D. Tex. Feb. 28, 2017) (using the term "employment contract" to refer to an agreement of either an employee or an independent contractor); *Ybarra v. Texas Migrant Council*, No. 5:15-CV-136, 2016 WL 5363732, at *4 (S.D. Tex. Aug. 11, 2016) (same); *King v. Bd. of Cty. Commissioners, Polk Cty., Florida*, No. 8:16-CV-2651-T-33TBM, 2017 WL 1093647, at *10 (M.D. Fla. Mar. 23, 2017) (referring to independent contractor's agreement as an "employment contract"); *Salim v. Sec'y of Health & Human Servs.*, No. 15-1255V, 2016 WL 4483049, at *1 (Fed. Cl. June 23, 2016) (same); *QinetiQ U.S. Holdings, Inc. & Subsidiaries v. C.I.R.*, 110 T.C.M. (CCH) 17 (T.C. 2015) (same); 41 Am. Jur. 2d Independent Contractors § 7 (using the term "employment contract" to refer to an agreement of either an employee or an independent contractor); 2 Federal Tax Guide to Legal Forms § 7:35 (2d ed.) (using the term "contract of employment" to refer to an agreement of either an employee or an independent contractor).

a dictionary entry from *2014*—which Prime mischaracterizes. The 1992 case defines the term "*employee*" for purposes of ERISA, a statute passed nearly fifty years after the Federal Arbitration Act. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 319 (1992) (emphasis added). It says nothing about the term "contract of *employment*"—let alone about the meaning of that term in 1925, when the Federal Arbitration Act was passed.

In 1925, although the term "*employee*" was sometimes—but by no means always—used as a term of art to denote a particular subset of workers (a subset that changed based on the purpose of the classification), other forms of the word employ were never used that way.[6] The terms "employ," "employer," "employment," and "contract of employment" *always* referred to all workers—including independent contractors.[7] In

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[6] In 1925, as now, where there was no reason to distinguish between different types of workers, the term employee was often used to mean *all* workers—including independent contractors. *See, e.g.*, *Indiana Harbor Belt Railroad*, 3 Dec. U.S. R.R. Lab. Bd. at 337 (explaining that in the Transportation Act of 1920, when Congress referred to "railroad employees[,] it undoubtedly contemplate[d] those engaged in the customary work directly contributory to the operation of the railroads"—including independent contractors); 49 C.F.R. § 390.5 (defining the term "employee" for purposes of the Motor Carrier Act to include any "driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle)").

[7] *See, e.g.*, *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 30 (1922) ("[T]he Court of Common Pleas held that the party employed was an independent contractor."); *Arthur v. Texas & P. Ry. Co.*, 204 U.S. 505, 516-17 (1907) (referring to "an independent contractor" as "employed . . . to do work upon the freight"); *Woodward Iron Co. v. Limbaugh*, 276 F. 1, 2 (5th Cir. 1921) ("[T]he moving of the coal by tramcars was not included in the work which Waters was

fact, the term independent contractor was—and still is—frequently *defined* as a worker "exercising an independent *employment*."[8]

Contrary to Prime's contention, the 2014 edition of Black's Law Dictionary does not suggest otherwise. That dictionary—published almost a century after the Federal Arbitration Act was passed—lists the term "contract of employment" as synonymous with the term "employment contract." Contract, *Black's Law Dictionary* (10th ed. 2014). The entry for "employment contract" states that the term was first used in 1927. *Id.* But it does not give the 1927 definition. *See id.* It gives the *2014* definition, which it lists as "a contract between an employer and employee." *See id.* Prime structures its argument on this point to misleadingly

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employed to do as an independent contractor."); *John L. Roper Lumber Co. v. Hewitt*, 287 F. 120, 121 (4th Cir. 1923) (listing circumstances under which "the employer is not answerable to a third person for injuries resulting from the negligence of the contractor"); *Pierson v. Chicago, R.I. & P. Ry. Co.*, 170 F. 271, 274 (8th Cir. 1909) ("An independent contractor is one who renders service in the course of an occupation representing the will of his employer only as to the result of his work and not as to the means by which it is accomplished."); Pet. App. 25a-29a; *infra* n.8.

[8] *See, e.g.*, *Prest-O-Lite Co. v. Skeel*, 182 Ind. 593 (1914) (emphasis added); *Alexander v. R. A. Sherman's Sons Co.*, 86 Conn. 292, 297 (1912); *Harmon v. Ferguson Contracting Co.*, 159 N.C. 22 (1912); *Karl v. Juniata Cty.*, 206 Pa. 633 (1903); *General Discussion of the Nature of the Relationship of Employer and Independent Contractor*, 19 A.L.R. 226, 227-232, 243 (1922) (citing numerous cases); *accord Nationwide Mut. Ins. Co. v. Smith*, No. 11-1266-JAR-GLR, 2017 WL 4338345, at *4 (D. Kan. Sept. 29, 2017); *Sellers v. Tech Serv., Inc.*, 421 S.C. 30 n.6 (Ct. App. 2017); *Timster's World Found. v. Div. of Employment Sec.*, 495 S.W.3d 211, 219 (Mo. Ct. App. 2016); *Standard Oil of Connecticut, Inc. v. Adm'r, Unemployment Comp. Act*, 320 Conn. 611, 623 (2016).

suggest that when the term "employment contract" was used in 1927, it bore this 2014 definition. *See* Pet. 16. But the dictionary does not say that. And there is no evidence to support that contention. (Nor is it clear how the definition of a term Prime contends did not exist until 1927 could help elucidate the meaning of a statute passed in 1925.)[9]

All historical evidence—including the edition of Black's Law Dictionary that was operative at the time—demonstrates that, when the Federal Arbitration Act was passed, the terms "employment," "employment contract," and, most importantly, "contract of employment" applied to *all* workers, including independent contractors. *See, e.g.*, *supra* page 7-8 & nn.7-8; *Black's Law Dictionary* 616 (2d ed. 1910) (lacking definition of "employment contract," but defining "independent contractor" as a worker "exercising an independent *employment*" (emphasis added)).

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[9] *Black's Law Dictionary* is actually wrong about when the term "employment contract" was first used. The term was used well before 1927. *See, e.g.*, *Blair v. Kingman Implement Co.*, 87 Neb. 736 (1910) (quoting contract entitled "employment contract"). But it seems to have been relatively rare at the time—a Westlaw search for "employment contract" between 1900 and 1930 turns up far fewer mentions than a search for "contract of employment." But when it was used, the term "employment contract," like the term "contract of employment," was used to mean simply an agreement to perform work—it applied to the agreements of independent contractors and other workers alike. *See, e.g.*, *Kelly v. Hanson*, 109 Okla. 248 (1925) (describing as an "employment contract" the agreement of an independent contractor to provide "for $15 per day . . . an engine and a man"); The Compensation Rev., Vol. XI at 384 (Mar. 1930) (using term "employment contract" to describe agreements of all workers, including independent contractors).

This Court's clear mandate is that statutes are to be interpreted according to their ordinary meaning *at the time* the statute was passed. It's not the First Circuit's decision that conflicts with this Court's precedent. It's Prime's reliance on anachronistic sources that don't even say what Prime says they do.

This analysis is no different simply because it involves the Federal Arbitration Act. Although this Court has given the statute's exemption for transportation workers "a narrow construction," it has never held that the exemption may be construed *more* narrowly than its plain text allows. *See Circuit City*, 532 U.S. at 118. This Court holds that courts interpreting the exemption should not go "*beyond* the meaning of the words Congress used"—not that they should ignore that meaning entirely. *Id.* at 119 (emphasis added).

Undisputed evidence demonstrates that the ordinary meaning of the phrase "contract of employment" at the time the Federal Arbitration Act was passed included the contracts of independent contractors. Under this Court's case law, that ordinary meaning must be enforced. That is precisely what the First Circuit did.

B. There is No Circuit Split on the Meaning of the Term "Contract of Employment" as Used in the Federal Arbitration Act.

The First Circuit is the first federal Court of Appeals to rule on whether the transportation worker exemption applies to all transportation workers, as its plain text dictates, or whether it should be interpreted contrary to the ordinary meaning of its terms to exclude independent contractors. Because there are no

other federal appellate decisions on this issue, there is not—and could not be—a circuit split. Prime's contention to the contrary is meritless.

Prime attempts to manufacture a split by mischaracterizing the Ninth Circuit's decision in *Van Dusen*. *See* Pet. 9 (citing *In re Swift Transportation Co. Inc.*, 830 F.3d 913 (9th Cir. 2016) ("*Van Dusen III*")). In that case, a trucking company petitioned the Court of Appeals for a writ of mandamus, after the district court issued a scheduling order providing for discovery on whether the contract at issue was a transportation worker's contract of employment exempt from the Federal Arbitration Act. *Id.* at 915. The Ninth Circuit denied the writ. *Id.*

The court explained that the company had not met the high standard required to demonstrate that the "drastic and extraordinary remedy" of mandamus was warranted. *Van Dusen III*, 830 F.3d at 915-17. The court gave several reasons, including: The district court had only issued a scheduling order—it had not yet ruled on whether the exemption applied—and when it ruled on the issue, it could very well correctly interpret the law; if the district court did eventually misinterpret the law, the company could appeal, meaning that it had an adequate remedy besides mandamus; and, at the time, the meaning of the transportation worker exemption was a question of first impression in every circuit, which meant that any district court ruling on the issue could not possibly satisfy the "clear error" standard required to grant mandamus. *See id.* at 916-17. None of these reasons had anything to do with the interpretation of the exemption—the district court hadn't even interpreted the statute yet.

Contrary to Prime's assertion, not a single judge on the panel stated that the "applicability of the Section 1 exemption turns on whether the plaintiff" is an independent contractor, Pet. 9. The majority opinion merely held that mandamus was unwarranted—it expressed no view on how the exemption should be interpreted. *Van Dusen III*, 830 F.3d at 915-17. Judge Ikuta, in dissent, argued that the court should have granted mandamus and ordered the district to define the term "contract of employment for purposes of the" Federal Arbitration Act "using standard tools of statutory construction." *Id.* at 920 (Ikuta, J., dissenting). And Judge Hurwitz, concurring, suggested that he agreed that Judge Ikuta's approach was the proper method for determining whether a contract is a "contract of employment" within the meaning of the statute. *Id.* at 918 (Hurwitz, J., concurring). But he believed that mandamus was nevertheless unwarranted because the district court hadn't even ruled on the company's motion to compel arbitration yet. *See id.* Neither Judge Ikuta nor Judge Hurwitz actually conducted the statutory interpretation they proposed, let alone stated that they believed that the result of that interpretation would demonstrate that the statute distinguished between workers based on employment status.[10]

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[10] To be fair, Judge Ikuta's opinion seems to imply that she suspected that upon conducting the proper statutory analysis, the district court would find that the exemption did not cover independent contractors. But she did not actually conduct this analysis. So, contrary to Prime's assertion, she did not—and could not—opine on the outcome. And, it turns out, if the district court had undertaken the analysis Judge Ikuta advocated, her suspicions would not have been borne out: The historical evidence uniformly demonstrates that the common meaning of the term

Thus, contrary to Prime's contention, the Ninth Circuit has not ruled on this issue at all. The Ninth Circuit has merely held that a district court's scheduling order for deciding the issue was not so clearly erroneous and prejudicial as to require the "drastic remedy" of mandamus. And the only two judges of the Ninth Circuit to have expressed any opinion on the issue have suggested that, in their view, the issue is one of statutory interpretation. That is, they *agree* with the First Circuit. There is no circuit split here. This Court should not allow Prime to manufacture one by mischaracterizing the case law.

Prime also mischaracterizes the lower court decisions on this issue. Prime states that courts "have uniformly understood the phrase 'contracts of employment'" in the Federal Arbitration Act to exclude independent contractors. Pet. 8-9. That's false. Lower courts are split on the issue. *See, e.g.*, *Owner-Operator Indep. Drivers Ass'n v. C.R. England, Inc.*, 325 F. Supp. 2d 1252, 1257 (D. Utah 2004) (noting split of authority); *Pacific 9 Transp., Inc. v. Labor Comm'r*, No. BC 544496 (Cal. Sup. Ct. July 8, 2014) ("Although there is a split of authority on this issue, the Court finds [the truck drivers'] briefing and cited authorities more persuasive.").

And although many district courts have *assumed* that the exemption does not apply to independent contractors, none of these courts actually analyzed the text of the statute, as required by this Court's case law. *See* Pet. App. 23a. The California Court of Appeal decision Prime cites suffers the same flaw. *See*

"contract of employment" at the time included the contracts of independent contractors.

Performance Team Freight Sys., Inc. v. Aleman, 241 Cal. App. 4th 1233, 1241-42 (2015).

No court that has actually examined the common meaning of the term "contract of employment" in 1925 has held that the exemption does not apply to independent contractors.

This issue is currently pending before the Ninth and Eleventh Circuits. *See Van Dusen v. Swift Transp. Co., Inc.*, No. 17-15102 (9th Cir.); *Gates v. TF Final Mile, LLC*, No. 16-17717 (11th Cir.). There is every reason to believe that these courts will adopt the First Circuit's approach—after all, it's the only approach that accords with the common meaning of the statute. But if they diverge, this Court can reconsider whether to take up the issue then. There is no reason to do so now.

II. REVIEW OF THE FIRST CIRCUIT'S CONCLUSION THAT COURTS MUST DETERMINE WHETHER THE FEDERAL ARBITRATION ACT APPLIES BEFORE RELYING ON IT TO COMPEL ARBITRATION IS UNWARRANTED.

There is no reason for this Court to review the First Circuit's commonsense conclusion that before relying on the Federal Arbitration Act to compel arbitration, a court must determine whether the Federal Arbitration Act applies. This conclusion accords with Supreme Court precedent and with the only other appellate decision to fully analyze the issue.

A. The First Circuit's Conclusion Accords with Supreme Court Precedent.

It is beyond dispute that courts may not rely on a statute for authority to act if the statute does not

apply. *See, e.g.*, *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 739 (2014); *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91 (2002); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201-02 (1956). This obvious truism is no different in the arbitration context: In *Bernhardt*, this Court held that courts may not rely on the Federal Arbitration Act to enforce an arbitration clause that the statute excludes from its reach. *See Bernhardt*, 350 U.S. at 201-02. The First Circuit's conclusion that before relying on the Act to compel arbitration, courts must determine whether the Act applies, is dictated by this case law.

The Federal Arbitration Act emphatically excludes the contracts of employment of transportation workers. 9 U.S.C. § 1 ("*[N]othing*" in the Act "*shall apply* to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." (emphasis added)). If a court were to rely on the Act to compel arbitration pursuant to an arbitration clause in a transportation worker's contract of employment, the court would be violating the law.

It would seem inarguable, then, that before relying on the Federal Arbitration Act to compel arbitration, a court must determine whether the arbitration clause at issue is contained in a transportation worker's "contract of employment." Prime does not dispute this general principle.

Instead, the company contends that there is an exception for contracts containing a delegation clause—that is, contracts where the arbitration provision not only provides for the arbitration of substantive disputes, but also delegates to the arbitrator the resolution of disputes about "arbitrability." Pet. 7.

Prime argues that—so long as a company includes a delegation clause in its contract—courts are required, under the Federal Arbitration Act, to compel arbitration of the question whether they have authority under the Federal Arbitration Act to compel arbitration. This argument is absurd. As the First Circuit explained, it "puts the cart before the horse and makes no sense." Pet. App. 14a. Contrary to Prime's contention, nothing in this Court's case law supports it.

As Prime acknowledges, this Court's precedent holds that a delegation clause is simply a species of arbitration clause. *See* Pet. 11-12 (citing *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010)). Compelling arbitration pursuant to a delegation clause is still compelling arbitration. And the Federal Arbitration Act cannot be used to compel arbitration pursuant to *any* arbitration clause contained within the contract of employment of a transportation worker—including a delegation clause. *See* 9 U.S.C. § 1. Therefore, to determine whether it has authority under the Federal Arbitration Act to enforce a delegation clause, a court must first determine whether the clause is contained in a transportation worker's "contract of employment"—just as it would with any other kind of arbitration clause.

Prime contends that the parties here "express[ly]" agreed that an arbitrator would determine whether the Federal Arbitration Act applies. Pet. 13. But this contention is both false and irrelevant.

1. Nothing in the company's contract says anything about who should decide the applicability of the Federal Arbitration Act. Prime's suggestion to the contrary is simply false. *Cf.* Pet. 13. So too is Prime's contention that because the contract delegates questions of "arbitrability" to the arbitrator, "the parties

agreed to arbitrate *every* gateway issue in a potential dispute." Pet. 7.

To the contrary, this Court has made clear that *not* every gateway issue is a question of "arbitrability" that may be delegated to an arbitrator. *See, e.g.*, *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297, 299 (2010) (formation issues always for the court to decide); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).

And with good reason. If every gateway issue were a question of "arbitrability" that could be delegated, a federal court whose subject matter jurisdiction was contested could be required to compel arbitration of the question whether it had jurisdiction to compel arbitration. *Cf. Vaden v. Discover Bank*, 556 U.S. 49, 62-63 (2009) (explaining that a federal court cannot compel arbitration unless it has subject matter jurisdiction over the underlying controversy). Courts could be forced to compel arbitration of a dispute about whether a validly formed agreement to arbitrate even exists. *Cf. Granite Rock*, 561 U.S. at 299; *Rent-A-Center*, 561 U.S. at 71 ("If a party challenges the validity . . . of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement."). And, as Prime advocates here, courts could be required to compel arbitration of the question whether they have authority to compel arbitration. *Cf. E.E.O.C. v. Waffle House*, 534 U.S. 279, 289 (2002) (refusing to compel arbitration because plaintiff was not a signatory to arbitration contract, and "nothing in the [Federal Arbitration Act] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement"). That is not the law.

To the contrary, arbitrability, as defined by this Court, is a far more limited concept than what Prime suggests. This Court defines "arbitrability" not as every possible gateway issue, but as the limited issue of "whether the parties have submitted a particular dispute to arbitration." *Howsam*, 537 U.S. at 83; *see AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986).[11]

Here, the question is not whether the parties agreed to submit a particular dispute to arbitration. It's whether Prime's contract with its drivers is a "contract of employment" exempt from the Federal Arbitration Act—and therefore whether the court has authority under the statute to enforce any agreement the parties might have entered. As the First Circuit properly held, this is an entirely "distinct inquiry" that has nothing to do with arbitrability. Pet. App. 13a. This Court has never held otherwise.[12]

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[11] In arguing otherwise, Prime cites this Court's decision in *AT&T*. Pet. 7. But *AT&T* defines "the question of arbitrability" narrowly, just like this Court's other case law, stating that "arbitrability" is whether a contract "creates a duty for the parties to arbitrate the particular grievance" at issue. *AT&T Techs.*, 475 U.S. at 649.

[12] Prime also argues that the mere fact that its arbitration clause states that arbitration will be conducted pursuant to the rules of the American Arbitration Association is somehow "clear and unmistakable" evidence that the parties delegated every gateway issue to the arbitrator. Pet. 7. It is not. For one thing, a bare reference to an arbitration provider's rules cannot possibly meet the "heightened standard" required to demonstrate that a party clearly and unmistakably agreed to delegate to an arbitrator an issue ordinarily reserved for the court. *See Rent-A-Center*, 561 U.S. at 69 n.1.

Moreover, the American Arbitration Association rules *do not* delegate every gateway issue to the arbitrator. They state that

To the contrary, this Court has repeatedly decided for itself disputes about whether a court has authority to compel arbitration, even in cases where the arbitration contract at issue delegated disputes about arbitrability to the arbitrator. *See, e.g.*, *Waffle House*, 534 U.S. at 289 (holding Federal Arbitration Act did not authorize arbitration under circumstances of the case); *id.* at 282 n.1 (reprinting arbitration provision, including delegation clause); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 673 (2012) (deciding whether Credit Repair Organizations Act precluded enforcement under the Federal Arbitration Act of an arbitration agreement between the parties in the case); Br. for Petitioners, *CompuCredit Corp. v. Greenwood*, 2011 WL 2533009, at *7-*8 (quoting arbitration provision, including delegation clause).

2. Moreover, even if Prime's contract did purport to delegate to an arbitrator questions about the court's authority to compel arbitration, if the contract is a "contract of employment," courts still could not rely on the Federal Arbitration Act to enforce that delegation. As this Court has made clear, where the Federal Arbitration Act explicitly limits courts' authority, parties may not override that limitation by agreeing

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"[t]he arbitrator shall have the power to rule on his or her own jurisdiction." American Arbitration Association, Comm. Arbitration Rules & Mediation Procedures, R-7. Not all gateway questions are questions of an arbitrator's jurisdiction—the gateway question here, for example, is a question of the *court's* authority.

This Court has never held that a bare reference to an arbitration provider's rules is clear and unmistakable evidence of delegation. And it certainly hasn't held that it can be clear and unmistakable evidence that the parties intended to compel arbitration of the question whether the court has authority to compel arbitration.

otherwise. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586-89 (2008).

The Federal Arbitration Act explicitly provides that courts may not rely on the Act to compel arbitration pursuant to an arbitration clause in a transportation worker's contract of employment. Under this Court's precedent, Prime cannot override that limitation by inserting a delegation clause into its contract.

Prime's entire argument to the contrary is merely a string of general platitudes about the Federal Arbitration Act, with no explanation of how these platitudes apply here. *See* Pet. 12-13. Prime states that this Court has held that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Pet. 12. But it fails to mention that this Court has expressly held that this presumption does *not* apply to delegation clauses. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995). And, in any case, the question here isn't the scope of Prime's delegation clause; it's whether a court has authority under the Federal Arbitration Act to enforce it. The Act is clear that it does not.

Prime also cites case law stating that the "overarching purpose" of the Federal Arbitration Act is "to ensure the enforcement of arbitration agreements according to their terms." Pet. 12. But, again, the question here is whether the Federal Arbitration Act applies at all. This Court has never adopted the nonsensical proposition that the Federal Arbitration Act ensures the enforcement of arbitration agreements that are explicitly *exempted* from the statute.

Moreover, even where the Federal Arbitration Act applies, this Court has identified numerous circumstances in which courts may—or even must—refuse to

enforce an arbitration agreement. *See, e.g.*, *Hall St.*, 552 U.S. at 586-89 (arbitration agreement conflicts with text of Federal Arbitration Act); *Vaden*, 556 U.S. at 62-63 (lack of subject matter jurisdiction); *Rent-A-Center*, 561 U.S. at 71 (specific arbitration clause at issue is unconscionable).

All the platitudes in the world cannot change the basic fact that a court simply cannot rely on the Federal Arbitration Act to compel arbitration if the Federal Arbitration Act does not apply. This Court has never held otherwise.

B. There Is No Split of Authority Worthy of this Court's Review.

The First and Ninth Circuits are the only Circuits to have considered in anything more than a cursory fashion whether the mere presence of a delegation clause means that a court must compel arbitration of the question whether it has authority to compel arbitration. Both circuits held that the answer, of course, is no.

Like the First Circuit, the Ninth Circuit rejected the contention that "contracting parties may invoke the authority of the" Federal Arbitration Act "to decide the question of *whether the parties can invoke the authority of the" Federal Arbitration Act. In re Van Dusen*, 654 F.3d 838, 844 (9th Cir. 2011) ("*Van Dusen I*"). The court explained that the Federal Arbitration Act "simply" has "no applicability" to a transportation worker's contract of employment. *See id.* Therefore, the court held, the Act cannot be used to compel arbitration under such a contract—regardless of whether there's a delegation clause. *See id.*

The trucking company in the Ninth Circuit case made the same argument Prime makes here—that a

court's authority to compel arbitration is a question of arbitrability that this Court permits parties to delegate to an arbitrator. *Van Dusen I*, 654 F.3d at 843. And, like the First Circuit here, the Ninth Circuit rejected that argument. *Id.* The court explained that under this Court's case law, questions of "arbitrability" are questions about "whether the parties have submitted a particular dispute to arbitration." *Id.* at 844. The question whether the Federal Arbitration Act "confers authority on the district court to compel arbitration" is not a question about whether the parties have submitted a particular dispute to arbitration. *Id.* It is not, therefore, a question of arbitrability. *Id.*

And while disputes about arbitrability may be delegated to an arbitrator, the Ninth Circuit observed, this "Court has never indicated that parties may delegate" determinations about the court's authority to compel arbitration. *Van Dusen I*, 654 F.3d at 844. "[O]n the contrary," it explained, this Court "has affirmed that, when confronted with an arbitration clause, the district court must first consider whether the agreement at issue is of the kind covered by the" Federal Arbitration Act—precisely the same position the First Circuit adopted here. *Id.*

In arguing that there is a circuit split worthy of this Court's review, Prime relies heavily on the Eighth Circuit's decision in *Green*. Pet. 8 (citing *Green v. SuperShuttle, Int'l, Inc.*, 653 F.3d 766 (8th Cir. 2011)). But that decision is cursory. It simply assumes—contrary to this Court's precedent—that all gateway questions are questions of arbitrability that may be delegated to an arbitrator. *Green*, 653 F.3d at 769. It fails to address this Court's decision in *Bernhardt*, which made clear that courts cannot rely on the

Federal Arbitration Act to enforce arbitration clauses if the statute does not apply. *See id.* And it does not even attempt to wrestle with the obvious consequence of forcing courts to compel arbitration under the Federal Arbitration Act without first determining whether the statute applies—that courts will end up violating the Act by relying on the statute in situations in which the statute explicitly prohibits courts from relying on it. *See id.*

Both Circuits that have actually analyzed this issue agree that before relying on the Federal Arbitration Act to compel arbitration, courts must first determine whether the Act applies. It's likely that once the Eighth Circuit has an opportunity to fully analyze the question, it too will adopt that obvious conclusion. And, if not, this Court can reconsider granting certiorari then.

The principle that courts cannot compel arbitration of the question whether they have authority to compel arbitration is so self-evident that there is no need for this Court to explicitly affirm it—at least not without some evidence that courts that fully consider the issue are getting it wrong.

III. PRIME AND ITS AMICI VASTLY OVERSTATE THE IMPACT OF THE DECISION BELOW.

Contrary to the dramatic lamentations of Prime and its amici, the First Circuit's ruling is not the end of arbitration in the transportation industry. *Cf.* Pet. 3. As the First Circuit itself explained in its decision, the inapplicability of the Federal Arbitration Act doesn't mean that arbitration agreements cannot be enforced. Pet. App. 34a. It merely means that state law—rather than federal—applies to their enforcement. *See, e.g.*,

Diaz v. Michigan Logistics Inc., 167 F. Supp. 3d 375, 380–81 (E.D.N.Y. 2016) (holding that even if contracts at issue were transportation workers' contracts of employment, exempt from the Federal Arbitration Act, the plaintiffs' "claims are subject to mandatory arbitration under New York arbitration law").

Indeed, on remand, Prime now seeks to compel arbitration pursuant to Missouri's arbitration statute—a fact the company conveniently fails to mention in its petition for certiorari. *See* Joint Statement, *Oliveira v. New Prime, Inc.*, No. 15-cv-10603, Docket No. 100, at 2-4 (D. Mass. Aug. 15, 2017).[13] Prime's argument to this Court that review is necessary because the decision below will have a "sweeping impact" is in direct conflict with its argument before the district court—that the First Circuit's decision has no impact at all because arbitration may still be compelled under Missouri law. *See id.*

As Prime's own arguments demonstrate, the company's contention that the First Circuit "effectively eliminated arbitration as a viable means of dispute resolution for the entire transportation industry" is false, Pet. 3. The First Circuit merely held that *one* means of enforcing arbitration—the Federal Arbitration Act—does not apply to a *limited* category of arbitration clauses—those contained in contracts of employment of transportation workers engaged in interstate commerce. Arbitration clauses that do not

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[13] Because Prime previously expressly disavowed reliance on Missouri law in moving to compel arbitration, Mr. Oliveira plans to argue that the company has waived this issue. Therefore, Prime may be unable to move to compel arbitration under state law in this case. But that's the result of Prime's own litigation decisions, not the First Circuit's interpretation of the Federal Arbitration Act.

fall into this narrow category are entirely unaffected. And even those that do fall into this category are not rendered unenforceable—they simply cannot be enforced under the *Federal* Arbitration Act. State law still applies.

Contrary to Prime and its amici's contention, the sky is not falling. Prime's own litigation conduct proves that. This Court should not grant certiorari based on a party's claims of public importance that the party's own conduct demonstrates are false.

IV. THIS CASE IS A POOR VEHICLE FOR REVIEW.

Even if Prime had raised issues worthy of this Court's review, this case is a poor vehicle for deciding them, because any decision by this Court would likely be irrelevant to whether the case is ultimately arbitrated or heard in court. *Cf. Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("We are not permitted to render an advisory opinion.").

First, even if this Court were to hold that the transportation worker exemption does not apply to independent contractors, Mr. Oliveira would still be entitled to demonstrate that Prime misclassified him, and that he was not, in fact, an independent contractor. It is quite likely he'd be able to do so. *See* Pet. App. 6a (describing allegations that although it labeled Mr. Oliveira an independent contractor, Prime "exercised significant control over his work"). The Federal Arbitration Act, therefore, still would not apply, and this Court's decision would have no impact on the case.

Second, Prime is still seeking to compel arbitration under Missouri law—despite the fact that the company expressly disclaimed any reliance on state law in its original briefing on its motion to compel. If

the district court finds that Prime has not waived its right to seek arbitration under state law, despite this explicit disclaimer, and if the court then compels arbitration under Missouri law, it won't matter whether the Federal Arbitration Act applies. And any decision from this Court on that issue will be irrelevant.

"It has long been [this Court's] considered practice not to decide abstract, hypothetical or contingent questions." *Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945). There is no reason to deviate from that practice here. There are two other cases currently pending before appellate courts on the issue of whether otherwise-exempt transportation workers are subject to the Federal Arbitration Act, simply because their employer labeled them independent contractors. There will, therefore, be more opportunities for this Court to consider this issue. There is no need for the Court to do so now, in a case where its decision will likely have no impact.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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